UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

E. I. DUPONT DE NEMOURS AND COMPANY	)	
AND	)	Case No. 5-CA-33461
AMPTHILL RAYON WORKERS, INC., INTERNATIONAL BROTHERHOOD OF DU PONT WORKERS	)	ALJ Michael A. Rosas

REPLY BRIEF OF RESPONDENT E. I. DUPONT DE NEMOURS AND COMPANY

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The record shows that DuPont specifically informed the Union, during bargaining, that DuPont would not offer its corporate-wide benefit plans (such as MEDCAP and the Dental Plan) to Union members unless the Union agreed to the reservation of rights provision contained in those plans. ALJ Rosas found that the Union "agreed to participation in the [Dental Assistance Plan] . . . subject to the Company's reservation of rights" and "agreed to participation in the new Aetna Plan (MEDCAP), including the reservation of rights clause." ALJD at 4, 6. ALJ Rosas likewise found that the reservation of rights provisions in the Dental Plan and MEDCAP remained unchanged from the time the Union agreed to participation in these plans through 2006, when the changes to MEDCAP and the Dental Plan at issue in this case were announced. *Id.* at 6, n. 37. Those reservation of rights provisions reserved to the Company the right to "amend," "discontinue," or "terminate" the plans, in the Company's discretion. *Id.* at 4, 5. The inescapable conclusion that flows from these key findings is that DuPont did not violate Section 8(a)(5) of the Act when it amended the eligibility provisions of MEDCAP and the Dental Plan to make employees hired after January 1, 2007 ineligible for retiree medical and dental benefits.

Perhaps recognizing that the ALJ's key factual finding – that the Union consciously agreed to participate in the Dental Plan and MEDCAP, with their reservation of rights provisions – should compel reversal of the Judge's ultimate holding, Counsel for the Acting General Counsel ("General Counsel") attempts to create a fiction to support the ALJ's ultimate finding that DuPont violated Section 8(a)(5). To that end, the General Counsel argues that the Union did not agree to MEDCAP in 1986, as the Judge found; instead, the General Counsel claims the Union agreed to some other mysterious corporate-wide health plan that somehow disappeared just as mysteriously as it appeared. GC Brief at 20. The General Counsel further mischaracterizes the record by claiming that prior bargaining over changes to the local BCBS

plan and BeneFlex – plans not at issue here – are among "numerous examples" of DuPont, in fact, bargaining over changes to MEDCAP and the Dental Plan. GC Brief at 27.

These arguments are pure fiction. The corporate-wide plan bargained in 1986 is clearly MEDCAP, as ALJ Rosas correctly concluded. And there is no evidence to support the General Counsel's assertion that the Company ever bargained over changes to MEDCAP or the Dental Plan, much less that it did so "numerous" times. These facts, considered in conjunction with key concessions from the General Counsel and existing case law, demonstrate that the Union's contractual waiver was clear and unmistakable.

A. Evidence Cited by the General Counsel Demonstrates the Parties "Fully Discussed" and "Consciously Explored" the Meaning of the Reservation of Rights Language, and that Language – as the ALJ Correctly Noted – Pertained to the MEDCAP Plan

The General Counsel dedicates three pages of his Answering Brief and seven pages of his Brief in Support of Limited Cross-Exceptions – which DuPont will address in an Answering Brief – to creating a fiction: that "the parties were not negotiating MEDCAP in 1986." GC Brief at 20. He fails to establish that fiction as truth. But what he does establish, through his arguments and through his record citations, is that the parties "consciously explored" the reservation of rights provision to which the ALJ correctly found the Union agreed in 1986.

The General Counsel cites and quotes from bargaining that took place in ten separate meetings between the Company and the Union, spanning the period from October 1985 through September 1986. GC Brief at 20-21; CG Brief in Support of Limited Exceptions at 2-8. All ten of those sessions focused on the reservation of rights issue and whether the Union would accept an alternative healthcare plan that reserved to the Company the right to make changes without bargaining with the Union. Then, distancing himself from the key conclusion reached by the ALJ – that the Union agreed to "participation in the new Aetna Plan (MEDCAP), including the

reservation of rights clause" (ALJD at 6) – the General Counsel half-heartedly contends that the "evidence arguably suggests that the Union did not agree to be bound by the Aetna plan's reservation of rights provision." GC Brief at 21. He then contends, in his second brief, that "the Aetna plan negotiated in 1986 was not MEDCAP." GC Brief in Support of Limited Cross-Exceptions at 8.

The Board should consider the evidence cited by the General Counsel, but not because it "arguably suggests" the Union refused to agree to the reservation of rights language or that the Aetna plan was not MEDCAP. The Board should consider the evidence because it demonstrates the extent to which the parties "consciously explored" the reservation of rights language of MEDCAP before, as the ALJ correctly concluded, the Union agreed to it.

To dispose of the General Counsel's suggestion – contrary to the ALJ's finding – that the parties were "not negotiating MEDCAP in 1986," the Board should consider additional evidence regarding the negotiations between these parties over the reservation of rights issue. That evidence – all of which is ignored by the General Counsel – includes:

- The first substantive discussions of MEDCAP in 1985, in which the Union refused to consider the plan until 1986. (*See, e.g.,* Resp. Exh. 3, tab 13, p. 2; *Id.*, tab 15, p. 3). There is no question that this conversation centered upon MEDCAP.

- The March 4, 1986 meeting at which DuPont alleviated some of the Union's concerns about MEDCAP by explaining that it would continue to offer the local Blue Cross Blue Shield ("BCBS") plan. The BCBS plan was offered locally at Spruance, not Company-wide, and therefore did not contain the reservation of rights language that appears in all of DuPont's Company-wide benefit plans. As management explained at that meeting, "Employees do not have to choose the Aetna Plan [MEDCAP] which contains the Management's Rights Clause if they are concerned." (Resp. Exh. 3, tab 19, p. 3). There can be no doubt that the parties were "fully discussing" MEDCAP and continuing to "consciously explore" the reservation of rights provision.[1]

[1] As the record makes abundantly clear, MEDCAP was offered as alternative medical plan to the local BCBS plan that was identified in the HMS article of the parties' contract. After the Union agreed to accept MEDCAP as an alternative to the BCBS plan, the parties negotiated how

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- A September 17, 1990 Employee Information Bulletin ("EIB") reflecting unambiguously that MEDCAP and the Aenta Plan are one and the same. Resp. Exh. 4, tab 1 ("Health Wise is Du Pont's newest addition to the Medical Care Assistance Program (MEDCAP) which is the Aetna insurance plan").

- An October 18, 1990 EIB to the same effect. Resp. Exh. 4, tab 2 ("Education of the AETNA (MEDCAP) Health Insurance Plan").

- A September 5, 1991 EIB to the same effect. Resp. Exh. 4, tab 3 ("Each employee can choose between Aetna/MEDCAP and BC/BS during September and October for 1992 coverage").

- An August 31, 1992 EIB again to the same effect. Resp. Exh. 4, tab 4 ("Each employee can choose between Aetna/MEDCAP and BC/BS," listing deductibles for each, including "Aetna/ MEDCAP").

In short, as the ALJ correctly held, there can be no dispute that the 1985-1986 discussions that resulted in the Union's agreement to an alternative health plan pertained to MEDCAP.[2]

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to recognize the alternative plan in the CBA, all of which underscore the Union's waiver. Resp. Exh. 3, tab 23, p. 2 ("The Union asked if the alternative insurance plan could be mentioned under the Industrial Relations Plans and Practices . . . The logic for that being it contains a Management's Rights Clause in it, and could be listed along with all of the other plans of which the Company has control."). As Judge Rosas found, the Company rejected the Union's suggestion to include MEDCAP in the IRP&P provision because that provision included a 1-year notice requirement, which would have prevented the Company from implementing changes on a timely basis. (ALJD at 6:35-37; 7:1-2). The parties ultimately agreed to include new, general language in the contract's HMS provision, rather than in the IRP&P provision, that made a general reference to an alternative to Blue Cross Blue Shield without specifically mentioning MEDCAP. (*Id.*, 7:4-6, 8-10). That alternative was MEDCAP, with its reservation of rights provision.

[2] If, as the General Counsel suggests, the parties discussed and reached agreement on some other mystery plan in 1986 – a plan other than MEDCAP – then one would expect the General Counsel to point to evidence of the parties later abandoning that plan and the Union ultimately agreeing to MEDCAP, as there is no dispute that retirees have long received their health care benefits through MEDCAP. The General Counsel, of course, adduced no such evidence to support its fiction. Because none exists.

For all of these reasons, the General Counsel's assertion that the parties "never negotiated the use of MEDCAP and its reservation of rights language" is plainly contradicted by the overwhelming record evidence, and the ALJ's findings, in this case.[3]

B. The General Counsel Concedes Key Facts Establishing that the ALJ's Holding is Erroneous

The General Counsel's Answering Brief is notable for its concessions. First, the General Counsel does not dispute that the Union "consciously explored" the meaning of the Dental Plan's reservation of rights provision before agreeing to it. Unlike his argument with respect to MEDCAP, the General Counsel does not claim that discussions of the Dental Plan's reservation of rights provision related to some other mysterious Company dental plan that no longer exists. Nor does the General Counsel dispute that the Dental Plan was included in the CBA for many years, until the advent of BeneFlex in 1993. ALJD at 4. Accordingly, the General Counsel effectively concedes that the Union agreed to participate in the Dental Plan, subject to the reservation of rights provision. The waiver reflected in that bargaining history and in the reservation of rights provision does not disappear simply because the Dental Plan is not referenced in the CBA after 1993; as noted in Section D, below, whether the waiver appears in

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[3] The General Counsel also endorses the ALJ's finding (ALJD at 17) that DuPont represented to the Union nearly 25 years ago that it would not eliminate MEDCAP or the Dental Plan and, as a result, DuPont was estopped from making the changes it implemented in 2006 – an argument never raised by the General Counsel. The General Counsel, however, fails to address DuPont's primary argument relating to this finding: that in the very same meeting at which this representation was allegedly made, DuPont reminded the Union that it reserved the right to change, modify or terminate these plans at any time. *See* DuPont's Brief in Support of its Exceptions pp. 25-28. The General Counsel also sidesteps DuPont's argument that any reliance on such a representation would be unreasonable as a matter of law, given the disclaimer that prefaced the quoted statement and the clear language of the reservation of rights provision (ALJD at 17).

the CBA or not is irrelevant, provided the record shows the parties "fully discussed" and "consciously explored" the waiver, which here it clearly does.

The General Counsel also fails to dispute any of the following facts, all of which support a finding that the Union waived its right to bargain over the changes to MEDCAP and the Dental Plan:

- The reservation of rights language in the Dental Plan and MEDCAP has not changed in the decades since the Union agreed to participate in those plans. ALJD at 5, 6 n.37.
- The Dental Plan was included in the CBA, and removed only when the Union accepted BeneFlex, which provided a new dental plan for active employees (but not retirees). ALJD at 4.
- The HMS provision of the CBA was removed only when the Union accepted BeneFlex, which provided a new medical plan for active employees (but not retirees). ALJD at 10.
- Since 1987, the Company, without bargaining to agreement or impasse, made more than fifty (50) unilateral changes to the Dental Plan and/or MEDCAP, most of which reduced benefits or increased their cost. ALJD at 9.
- Those 50 changes included modifications to participant eligibility criteria, just as the changes announced in 2006 modified participant eligibility criteria. ALJD at 9.
- The Union never filed a grievance or unfair labor practice charge regarding any of these changes, prior to the changes at issue. ALJD at 10.

Each of these points supports the inescapable conclusion that the Union waived its right to bargain over changes to MEDCAP and the Dental Plan.

C. The General Counsel's Assertion that the Record Reflects "Numerous Examples" of Bargaining over MEDCAP and the Dental Plan is Disingenuous and Plainly Misleading

The General Counsel claims that the record reflects "numerous examples where bargaining over prior changes" to MEDCAP and the Dental Plan occurred, that "the Union frequently demanded bargaining over plan changes," and that "DuPont still recognized that it had to bargain over changes." GC Brief at 26-27. In support of these assertions, the General

Counsel cites to only seven instances of alleged bargaining over changes to these plans during the 20 plus years since the Union agreed to participate in them. *Id.*

Even a cursory reading of the evidence cited by the General Counsel reveals that none of the seven cited examples reflects bargaining over MEDCAP or the Dental Plan. This fiction, first set forth in the General Counsel's brief to the ALJ, centers upon the following instances of alleged bargaining over changes to MEDCAP or the Dental Plan:

- General Counsel Assertion: Bargaining over changes to the BCBS plan in 1991 and 1992 reflects bargaining over MEDCAP and/or the Dental Plan. GC Brief at 26, citing Resp. Exh. 4, tabs 3 and 4.
  Record Facts: The BCBS plan was not MEDCAP or the Dental Plan; it was a stand-alone, local medical plan without a reservation of rights provision. DuPont has always bargained over changes to the BCBS plan and has never claimed otherwise and changes to the BCBS plan are not at issue here. Resp. Exhs. 5a and 5b.

- General Counsel Assertion: A reference in 1993 to upcoming bargaining over participation in the new BeneFlex plan was another example of bargaining over MEDCAP or the Dental Plan. GC Brief at 26, citing Resp. Exh. 4, tab 6 at DUP009075.
  Record Facts: This was a reference to upcoming bargaining with the Union about participation in a brand new cafeteria plan – the BeneFlex Flexible Benefit Plan – and not about changes to MEDCAP or the Dental Plan. The Union ultimately agreed to participate in BeneFlex – a fact that is wholly unrelated to the question of waiver presented in this case. ALJD at 10.

- General Counsel Assertion: In 1997, the parties bargained over changes to MEDCAP and/or the Dental Plan by virtue of the Union "express[ing] to the Company its desire to bargain over changes." GC Brief at 26, citing GC Exh. 8 at DUP0015456-57.
  Record Facts: This is a reference to BeneFlex and not MEDCAP. Moreover, the Company reminded the Union in the very same meeting that "changes such as these can be made and as done in the past Management wants to inform the Union of such matters." GC Exh. 8 at DUP0015456-57.

- General Counsel Assertion: In 1999, a discussion of changes to BeneFlex rates, during which the Union requested bargaining over the rates, constituted bargaining over changes to MEDCAP or the Dental Plan. GC Brief at 27, citing Resp. Exh. 3, tab 64 at DUP008823.
  Record Facts: This is obviously a reference to BeneFlex – not MEDCAP – and the General Counsel fails to mention that the Company told the Union at this meeting "the BeneFlex language which has been bargained with the Union provides for the ability to change rates. Management said it is simply informing the Union of the rate changes under the BeneFlex [sic] Health Care." Resp. Exh. 3, tab 64.

- General Counsel Assertion: In 2000, the parties bargained over MEDCAP or DAP when the Union asked the Company whether its announcement of changes to BeneFlex was "bargaining or just telling them information." GC Brief at 27, citing Resp. Exh. 3, tab 65.
  Record Facts: This is again a reference to BeneFlex – not MEDCAP – and this exchange obviously does not constitute bargaining. It was simply the Company "reviewing the 2001 BeneFlex plan changes." Resp. Exh. 3, tab 65.

- General Counsel Assertion: 1987 bargaining notes reflect a change to the Dental Plan among a list of other items, including "Inform the Committee who will be working on UGF as co-chairperson." A note reads "Above subjects must be bargained with the Union before implementation." GC Brief at 26, citing GC Exh. 3 at 3.
  Record Facts: The General Counsel fails to cite any evidence demonstrating that the change was actually bargained; in any event, one isolated reference over a 30-year period surely does not constitute "numerous examples" of bargaining over changes to MEDCAP or the Dental Plan.

In short, these alleged instances of bargaining over changes to MEDCAP or the Dental Plan – which constitute the universe of such alleged bargaining cited by the General Counsel – demonstrate the opposite. Six of the seven "examples" pertain to the local BCBS plan or BeneFlex, not MEDCAP or the Dental Plan. And none of the examples involving BeneFlex, other than the initial bargaining over the Union's participation in BeneFlex, reveals any bargaining, nor would they, since, similar to its agreement with MEDCAP, the Union agreed when it accepted BeneFlex that the Company retains the right to make changes to BeneFlex plans without bargaining. (Jaffe Arbitration Decision, Resp. Exh. 12, at 59-60).

In fact, the record is devoid of examples of bargaining over changes to MEDCAP and the Dental Plan – an unsurprising fact, since the Union understood for three decades that it had waived its right to bargain changes to those plans.[4]

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[4] The General Counsel's citations in another part of his Answering Brief to a handful of other meeting minutes relating to Union demands for bargaining are similarly misleading and unavailing. *See* GC Brief, p. 8 (citing meetings where (1) BeneFlex changes were announced (GC Exh. 8); (2) the Union expressed concern about an individual being approved for psychiatric

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D. The General Counsel Fails to Rebut DuPont's Argument that *Southern Nuclear* and *Mississippi Power*, on which the ALJ Relies, Are Cleary Distinguishable

The General Counsel's Answering Brief – like the ALJ's decision – relies on *Southern Nuclear Operating Co*. 348 NLRB 1344 (2006), *enf'd in part denied in part,* 524 F.3d 1230 (D.C. Cir. 2008) and *Mississippi Power Co*. 332 NLRB 530 (2000), *enf'd in part,* 284 F.2d 605 (5th Cir. 2002). As set forth in DuPont's opening brief, those cases are readily distinguishable. In neither *Southern Nuclear* nor *Mississippi Power* – the two cases on which the ALJ's decision hinges (ALJD at 12-13) – was there any evidence that the parties "consciously explored" the relevant reservation of rights language that was set forth in the plan documents. Here, in stark contrast, the Union and the Company discussed on multiple occasions – spanning a period of many months – the reservation of rights language itself. The Union fully understood the import of that language, as reflected in the various exchanges cited by DuPont and by the General Counsel (while the General Counsel argues, to no avail, that those exchanges pertained to some other corporate-wide plan). GC Brief in Support of Limited Exceptions at 2-8. Unlike the parties in *Southern Nuclear* and *Mississippi Power*, the parties here "consciously explored" whether the Union would accept MEDCAP and the Dental Plan, and consciously explored the key condition to doing so: the Union waiving the right to bargain over changes to those plans. The General Counsel fails to address this key distinction between the facts of this case and the facts of the cases on which the ALJ primarily relies.

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care (GC Exh. 4); (3) management explained that a PCP is not required for outpatient surgery performed by in-network gynecologists (GC Exh. 5); and (4) Management responded to a question about why Cigna was chosen as a carrier (Resp. Exh. 3, tab 61)). None of these examples reflects bargaining over MEDCAP or the Dental Plan.

E. Responding to Information Requests Does Not Constitute Bargaining

The General Counsel's Answering Brief continues to conflate the law regarding information requests with the law regarding bargaining. The General Counsel correctly notes that a request for information can constitute a demand for bargaining – a proposition that DuPont did not and does not contest. GC Brief at 28. However, the General Counsel does not cite a single case standing for the proposition that merely responding to an information request constitutes bargaining or an admission that the responding party has an obligation to bargain over the subject matter of the request. No such case exists. Accordingly, that DuPont routinely provided information to the Union – often unsolicited – regarding benefits and benefit plan changes in no way supports the General Counsel's contention – and the ALJ's finding – that such conduct evinces an absence of a waiver.

CONCLUSION

For all of the foregoing reasons, the ALJ's Decision should be reversed, and the Complaint should be dismissed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this the 14th day of November 2011, I caused a true and accurate copy of the foregoing to be served by electronic mail on the following parties:

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